IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant,

v.

W.P. DODD; ERNESTINE DODD, his wife; and COLUMBIA GAS TRANSMISSION CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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This Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it is manifest that this appeal does not present a substantial federal question, that the judgment below clearly rests on an adequate non-federal basis, and on other grounds which this Appellee will present herein which establish that this Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Chief Justice Haden of the Supreme Court of Appeals of West Virginia is reported at 221 S.E.2d 171 (W. Va. 1975). A copy of the opinion below is set out in full in Appendix A, appended to Appellant's Jurisdictional Statement.

The judgment of June 19, 1972, by the Circuit Court of Kanawha County, West Virginia, incorporating the Court's memorandum of opinion of April 17, 1972, is set out in full in Appendix B, appended to Appellant's Jurisdictional Statement.

JURISDICTION

The suit involved in this appeal was brought by Appellant herein to set aside as a cloud upon her alleged title to an oil and gas interest a conveyance of such interest by a tax deed made pursuant to a state statute. The judgment of the Supreme Court of Appeals of West Virginia was filed on December 18, 1975. Notice of Appeal was filed with the Supreme Court of Appeals on February 26, 1976.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2) or, in the alternative, § 1257(3).

STATUTES INVOLVED

The case involves the validity of West Virginia Code §§ 11A-4-12 and 11A-3-8. These statutes are set out in Appendix C, appended to Appellant's Jurisdictional Statement.

QUESTION PRESENTED

The question presented for review is: Whether under the requirements of due process of law embodied in the fourteenth amendment to the United States Constitution a West Virginia statute may permit a tax sale of real property, owned by the State, upon publication naming the former owner as a defendant and also naming, as defendants, unknown parties claiming under the former owner.

STATEMENT OF THE CASE

By a deed executed and recorded in 1937, the Appellant, Cecle G. Pearson, acquired a one-fourth interest in all of the oil and gas in sixty-eight acres of land located in Kanawha County, West Virginia. Although the Appellant did not cause a change of the entry in the Land Books (the official assessment rolls for real property in West Virginia) from the former owner's name to her own, Appellant's husband paid the real estate taxes on her interest from 1938 until 1960. No taxes were paid on Appellant's interest in 1961. As a result of this nonpayment, in 1962 the property embraced by the assessment of Appellant's interest (a mineral interest) was declared delinquent and was sold to the State of West Virginia pursuant to statute.

In 1966, the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County (the statutory officer of the State charged with the duty of selling delinquent and irredeemable real estate) instituted a statutory suit in the name of the State for the sale of this real property interest. On April 26 of that year, in

keeping with orders entered in the suit, the Deputy Commissioner conveyed by a tax deed to Appellee W.P. Dodd (the purchaser at the Deputy Commissioner's sale), the property assessed in the name of H.C. Pearson, Jr. In 1967, Mr. Dodd and his wife ratified an existing lease upon the sixty-eight acres held by United Fuel Gas Company, and granted United the right to drill a natural gas well. This well was completed in 1968 at a cost of $104,500.87 and produced an initial open flow of one hundred million cubic feet of gas. Columbia Gas Transmission Corporation, this Appellee, is the successor in interest to United.

On July 26, 1968, Mrs. Pearson paid the State Auditor $101.86 and received what was designated a Certificate of Redemption of Lands in her name for the property in question. However, at that time, the property was irredeemable under Code § 11A-3-8 and the attempted redemption was, within the statutory intention, of no effect. Appellant subsequently filed this suit against the Dodds and United Fuel.

West Virginia Code § 11A-4-12 permits the sale of delinquent property interests previously sold to the State and irredeemable (the situation involved in this case) upon notice by publication upon "unknown parties who are or may be interested in any of the lands included. . . ." A statutorily sufficient notice of the sale in question was given by publication.

Upholding the statutory scheme for tax sales and affirming that this particular sale was in keeping therewith and in keeping with due process requirements, the Circuit Court granted judgment for the defendants-appellees. In its letter memorandum of opinion, it held, *inter alia*, that the notice provisions of § 11A-4-12 did not deny the plaintiff-appellant due

process of law under the State Constitution or the United States Constitution. The Supreme Court of Appeals of West Virginia affirmed the judgment of the Circuit Court.

ARGUMENT

WEST VIRGINIA CODE §11A-4-12 PERMITTING A TAX SALE OF REAL PROPERTY, OWNED BY THE STATE, UPON PUBLICATION NAMING THE FORMER OWNER AS A DEFENDANT AND ALSO NAMING UNKNOWN PARTIES CLAIMING UNDER HIM AS DEFENDANTS DOES NOT DENY DUE PROCESS OF LAW.

Almost eighty years ago this Court directed its attention to the question again before this Court on appeal by Pearson. In a case styled *King v. Mullins*, 171 U.S. 404 (1898), the very question before this Court was whether the system of taxation in the State of West Virginia, and its provisions for forfeitures, were repugnant to the fourteenth amendment of the Constitution of the United States. In holding that the system established by the State of West Virginia is not inconsistent with the due process of law required by the Constitution of the United States, this Court said:

> "The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws."

The principles governing the situation in this appeal by Pearson are more recently and succinctly endorsed in a case styled *Balthazar v. Mari Ltd.*, 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd* 396 U.S. 114 (1969), wherein the Court below said:

> "Relying upon Supreme Court condemnation cases, plaintiffs also maintain that they were deprived of 'just compensation' for their property. See, *e.g.*, United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943); City of Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930); Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); Brown v. United States, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923); Chicago Burlington and Quincy R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."

Once again, the Court cited with approval the definitive and determinative decision of *King v. Mullins, supra.*

To some considerable extent, the decision in *King* was founded upon the earlier decision of this Court in the case styled *Bell's Gap Railroad v. Pennsylvania*, 134 U.S. 232, 239 (1890), wherein this Court declared:

> " 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages * * *.' "

In the *Balthazar* holding, affirmed by this Court, the Court below cited with approval as late as 1969 the holding of this Court in the *Bell's Gap Railroad* case, *supra.*

In a case styled *King v. West Virginia*, 216 U.S. 92 (1910), which was a companion case to *King v. Mullins, supra*, once again the Appellant raised the spectre of an alleged denial of due process under the fourteenth amendment. Because of the previous holding by this Court in *King v. Mullins*, in *King v. West Virginia* this Court said then (and the expression is apt to this appeal): "The question is not open and we shall discuss it no more." Appellee submits that as long ago as 1898 it was determined that the system for perfecting tax deeds in West Virginia does not violate the due process provisions of the fourteenth amendment.

In *Kentucky Union Co. v. Kentucky*, 219 U.S. 140 (1911), as against a claim of denial of due process under the fourteenth amendment to the Constitution, this Court upheld the Kentucky Act of 1906 Relating to Revenue and Taxation. As recited in the opinion, the Kentucky Act permitted a proceeding by publication "in the name of the Commonwealth of Kentucky, as plaintiff, against the said tract of land and the owners or claimants of said land, as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as unknown owners and claimants thereof". This Appellee submits that the Appellant was proceeded against here by publication as an unknown defendant because she was an unknown defendant, and that she was not denied due process within the holding of the *Kentucky Union* case.

In *Leigh v. Green*, 193 U.S. 79, 90 (1903), the Nebraska statute involved clearly authorized a foreclosure to satisfy a tax lien without actual service against all lienholders within the jurisdiction of the Court. In upholding the statutory provisions for process by publication, this Court observed:

"Nor is the remedy given in derogation of individual rights, as long recognized in proceedings *in rem*, when the 14th Amendment was adopted. The statute undertakes to proceed *in rem*, by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in Cooley on Taxation, 2d ed. 527: 'Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form.' "

In *Ballard v. Hunter*, 204 U.S. 241, 262 (1907), in upholding an Arkansas statute, which permitted other than personal service, against the onslaught of alleged violation of due process of the fourteenth amendment, this Court said:

> "It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it

must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Improv. Co. 130 U.S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

As observed in the decision in this case by the Supreme Court of Appeals of West Virginia, under Code § 11A-3-8 if redemption by the owner does not occur within eighteen months of the date that the tax delinquent property is sold to the State of West Virginia, then absolute title vests in the State of West Virginia. The interest of Appellant was sold to the State in 1962. The publication of which Appellant complains occurred in 1966 at a time when the State, in effect, was auctioning off land which it owned because of the previous delinquent tax procedure.

Decisions of the Supreme Court of Appeals of West Virginia have consistently held that the former owner has no right to be a party to the proceedings for the

sale of land previously sold to the State of West Virginia for delinquent taxes. *State v. Simmons*, 135 W.Va. 196, 64 S.E.2d 503 (1951); *State v. Gray*, 132 W.Va. 472, 52 S.E.2d 759 (1945); *State v. Blevins*, 131 W.Va. 350, 48 S.E.2d 174 (1948); *McClure v. Maitland*, 24 W.Va. 561 (1884).

Appellant cites the authority of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to the following effect:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reason disappears for resort to means less likely than the mails to apprise them of its pendency." (At page 318 of 339 U.S.)

In the factual situation in this case involving the Appellant Pearson, the notice complained of occurred in 1966. The record is devoid of any indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of the Appellant. Indeed, in her statement of the case, the Appellant concedes that in spite of the deed to her from H.C. Pearson, Jr. in 1937, the Appellant did not have corrected the entry in the Land Books from the former owner's name to her own.

The plain import of the Appellant's position is that a valid tax sale in 1966 required the State to pursue a record title search for a period of thirty years going back to 1937, to find Appellant's name and claimed interest, and then to pursue some further inquiry as to her address, despite the impossibility or impracticability of such an endeavor by reason of the passage of almost thirty years.

This contention is best answered by the authority of *City v. New Rochelle v. Echo Bay Waterfront Corp.*, 49 N.Y.S.2d 673, 268 App. Div. 182, *aff'd* 60 N.E.2d 838, 294 N.Y. 678, *cert. denied*, 326 U.S. 720 (1945), to the following effect:

> "It is settled law, however, that indirect notice is sufficient to persons interested in real property which is in default in payment of taxes. 'The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. This accountability of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service.' Ballard v. Hunter, 204 U.S. 241, 254, 255, 27 S.Ct. 261, 266, 51 L.Ed. 461."

Appellant cites the authority of *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), in which this Court held that newspaper publication of condemnation proceedings against a landowner, whose name was known to the city and on official records, was insufficient notice to meet the requirements of due process.

Once again, there is not the slightest indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of the Appellant at that time.

With reference to *Walker, supra*, which was a condemnation case, beyond peradventure the landowner who complained of inadequate notice in that case was truly the owner. In the facts involved in this appeal by Pearson, in view of the provisions of Code § 11A-3-8,

after the passage of eighteen months from the sale of Appellant's land in 1962 to the State of West Virginia, the owner was not the Appellant but rather the State of West Virginia.

The case of *Schroeder v. City of New York*, 371 U.S. 208 (1962), cited by Appellant, must be distinguished from the present appeal. Once again, the *Schroeder* case involved a condemnation case wherein the Appellant was admittedly the true owner. Moreover, the record in that case reflected that both the name and address of the Appellant were readily ascertainable. Furthermore, analysis of this decision indicates that the condemning authority did not comply with the requirements for posting, as specified in the enabling legislation, which omission alone violated the requirements of statute.

The case of *Covey v. Town of Somers*, 351 U.S. 141 (1956), also relied on by Appellant, involved the foreclosure of tax liens on real property where the conceded owner of the property (proceeded against by mailing, posting and publication) was an incompetent without the benefit and protection of a guardian. In contrast, in this case the Appellant Pearson concedes that she knowingly did not fulfill her responsibility in changing the entry on the Land Books from the name of the former owner to her own. Moreover, after paying the taxes for the years 1938 through 1960, Appellant concedes that she omited to pay taxes assessed for 1961. Under such facts, the Appellant Pearson can hardly equate her position with that of the incompetent in the *Covey* case.

Since the authorities support this Appellee's position that notice by publication does not deny due process of law, this appeal does not require consideration of whether a statute of limitation (which Appellant

characterizes Code § 11A-3-8) might bar Appellant from contesting the validity of the tax sale.

The Supreme Court of Appeals of West Virginia in its decision against the Appellant Pearson went to the heart of the matter when it held:

> "We have determined that the forceful arguments advanced to restore the property interest of a former owner must, necessarily, fall before compelling State interests,–often recognized in prior decisions and tenaciously maintained in statements of legislative policy–, to resolve uncertainties in land titles and to protect the State's revenues derived from land usage taxation. In this endeavor, we have intended to balance delicately the interests of the individual with those of all the State's citizenry, within the constitutional parameters of due process." (App. at 23A).

Under the authority of *King v. Mullins, supra*, decided by this Court almost eighty years ago and never overruled, innumerable land titles in the State of West Virginia are founded upon the proposition that statutory tax delinquency procedures in West Virginia do not deny due process of the fourteenth amendment to the Constitution. This Appellee respectfully submits that this Court should affirm that principle; indeed any other holding would wreak havoc in the State of West Virginia.

CONCLUSION

Counsel for this Appellee, Columbia Gas Transmission Corporation, respectfully submit that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not

present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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